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No. 05-52

In The Supreme Court of the United States

**BFM LEASING COMPANY, LLC;
LAND OAK LEASING, LLC,**

Petitioners,

v.

**PHILADELPHIA INDEMNITY
INSURANCE COMPANY,**

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

PETITION FOR WRIT OF CERTIORARI

Fred G. Musick
Counsel of Record for Petitioners
Brian C. Quist
JENKINS & JENKINS, P.C.
2121 First Tennessee Plaza
Knoxville, TN 37929
(865) 524-1873

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTION PRESENTED FOR REVIEW

Was it fundamentally unfair, indefensible judicial activism and prejudicial error to grant summary judgment *sua sponte* against Petitioners on an issue not raised by Respondent without notice to Petitioners and without affording Petitioners an opportunity to address such issue?

CORPORATE DISCLOSURE STATEMENT

BFM Leasing Company, LLC, and LandOak Leasing, LLC, have no parent corporation, and no publicly held company owns any stock in either of them.

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OPINIONS BELOW

The Memorandum Opinion and Order of the United States District Court for the Eastern District of Tennessee at Knoxville at No. 3-02-cv-714, granting Respondent-Defendant's Motion for Summary Judgment and dismissing the suit, is set forth in the Appendix at A-1. The Sixth Circuit Opinion, *BFM Leasing Company, LLC v. Philadelphia Indemnity Insurance Company*, 2005 WL 566712 (No. 03-6528) (6th Cir. 2005) (unpublished), affirming the Order of the district court is set forth in the Appendix at A-13. The Sixth Circuit Order denying Petitioners' Petition for Rehearing is set forth in the Appendix at A-29.

JURISDICTION

This is a federal civil action. The Opinion and Order of the Sixth Circuit affirming the grant of summary judgment and dismissal was filed on March 10, 2005. The Order of the Sixth Circuit denying the petition for rehearing was filed on April 4, 2005. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]"

Fed. R. Civ. P. 56 provides in pertinent part as follows:

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

This is a federal civil action based on diversity of citizenship and amount in controversy over which the District Court for the Eastern District of Tennessee had jurisdiction pursuant to 28 U.S.C. § 1332. Petitioners filed a complaint for rescission of a contract of insurance and return of $377,995.49 in insurance premiums paid to Respondent, Philadelphia Indemnity Insurance Company ("PIIC"), by Petitioners BFM Leasing Company, LLC ("BFM"), and LandOak Leasing, LLC ("LandOak"), or, in the alternative, breach of contract for nonpayment of the "claims" outstanding at the time suit was filed and later submitted. Basically, as a result of a later-discovered Ponzi scheme committed by the principal of their independent sales agent, Jeff Coppinger, BFM and LandOak mistakenly entered into master insurance agreements annually with PIIC, and thereafter mistakenly enrolled vehicles for residual value insurance, and based upon these mistakes paid residual value insurance premiums over several years on cars that either did not exist or were uninsurable under the insurance policy.

The facts giving rise to this action may be summarized as follows. At all times material herein, Jeff Coppinger ("Coppinger") was the President of Cherokee Rental, Inc. ("Cherokee"), which had been in the business of renting and leasing automobiles for a number of years in different cities across East Tennessee. In 1997, Cherokee, through Coppinger, approached Patrick Martin ("Martin") and Mike Atkins ("Atkins") with a business idea whereby Martin and Atkins would recruit capital and credit to purchase automobiles, which would then be leased to significant corporate accounts. The company created by Martin and Atkins for this purpose, BFM, was to own the vehicles, and Cherokee was to find leasing customers for BFM.

In March of 1997, BFM and Cherokee executed an Independent Business Agreement ("Agreement") to define their respective roles in the new business arrangement. Under the Agreement, BFM was to provide funding for the vehicles, which were to be titled in the name of BFM, while Cherokee was to independently solicit, procure, administer, manage, deliver vehicles, and collect payments. BFM agreed to pay commissions to Cherokee in the amount of $750 on each lease and additional fees after the lease term and sale of the vehicle. As to the relationship created by this Agreement, Cherokee was expressly the independent contractor of BFM and, by virtue of the Agreement, no joint venture or partnership arrangement was implied. To be sure, Cherokee was contracted to achieve a completed result and BFM expressly had no rights to direct the manner in which Cherokee achieved such results.

In 1999, LandOak was formed by Martin and Atkins as a separate entity and began funding vehicles for Cherokee in a manner identical to the Agreement. While a separate written agreement had not yet been executed between LandOak and Cherokee, the intent of the relationship between Cherokee and LandOak was to be the same as the Agreement between BFM and Cherokee. That is, Cherokee was the commissioned, independent contractor for LandOak. Indeed, that is how the parties operated for almost six months.

As was only discovered long after the fact, Cherokee, through Coppinger, took advantage of the vast independence granted it under the Agreement and defrauded BFM and LandOak from the very beginning by falsifying documents and fund requests. Unbeknownst to BFM and LandOak, Coppinger was creating fictitious title applications for vehicles that in many cases just did not exist and bogus leases for those vehicles which did exist but were to be put into Cherokee's rental fleet for its own use instead. To complicate matters, on

some vehicles that did actually exist, Cherokee wrongfully titled said vehicles in the name of Cherokee, not BFM or LandOak as required, and then gave use of those vehicles to Coppinger family and friends. The reason the fraud went undetected is that Cherokee was always able to present BFM and LandOak with the periodic lease revenue for the false leases. Again, as found out much later, the source of the so-called lease payments collected by Cherokee was additional funding requests from BFM and LandOak for purported new vehicle leases. Basically, Coppinger was engaged in a Ponzi scheme.

In the automobile leasing business, owner-leasers such as BFM and LandOak can purchase an insurance product called "residual value insurance." Residual value insurance is simply a guarantee from an insurance company that at the end of a long-term lease, the insured automobile will have a certain value. Parties first enter into master insuring agreements as did BFM, LandOak, and PIIC annually from 1997 through 2000. BFM and LandOak entered into these master insuring agreements under the belief, which turned out to be mistaken, that they would have real, insurable vehicles, subject to legitimate long-term leases. Vehicles leased/rented for periods of less than 24 months were expressly uninsurable.

From 1997 through 1999, as vehicles were acquired and purportedly leased by Cherokee, BFM and LandOak "enrolled" them as insurable vehicles with PIIC by completing an enrollment application and paying the required premiums. In this case, the master insuring agreements provided that the lease-end value calculation was to be made pursuant to the MVP settlement option endorsement and reference therein to a trade publication as opposed to the actual specific value of the given vehicle. When copies of vehicle title applications, leases, and supporting paperwork were received from Cherokee, BFM and LandOak believed insurable vehicles

existed. When BFM and LandOak then delivered vehicle enrollment applications and premium payments for residual value insurance to PIIC, PIIC likewise believed insurable vehicles existed. It cannot be overemphasized that the mistake of facts occurred at the entering into of the master insuring agreements as well as at the time of the enrollment of each vehicle thereafter.

When the State of Tennessee failed to return certain titles in response to the submitted applications, BFM and LandOak hired an accountant, Sharon Draper, to assist Cherokee's office personnel with what was deemed at the time to be a lack of organizational skills on the part of Cherokee. As a result of the accountant's involvement with Cherokee's organization, BFM and LandOak grew suspicious of a much greater problem than just Cherokee's organizational skills. As soon as Coppinger realized that BFM and LandOak were "on" to him and discovery of his fraud was inevitable, he came to Atkins and Martin and confessed.

When BFM and LandOak informed PIIC that the enrolled vehicles either never existed or were never leased as believed (and therefore not insurable), BFM and LandOak asked for return of the premiums paid. PIIC, however refused to do so. By letter from its attorney, Walter W. Bussart, dated December 17, 2001, PIIC attempted to justify keeping the premiums by insisting that the premiums were earned because PIIC was at risk of loss in the payment of claims (regardless of whether the cars existed). In response to that position, BFM and LandOak began submitting applications for policy benefits to which no response was ever sent to BFM or LandOak. BFM and LandOak then filed this civil action for rescission of the contract and return of the premiums paid.

PIIC filed a Motion for Summary Judgment (App. at 31, 33) as to both counts of the complaint, and it is the district